STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EDWARD DAVIDSON, Charging Party, v. PUBLIC EMPLOYEES UNION, LOCAL #1, Respondent.	Case No. SF-CO-587-E PERB Decision No. 1537 June 24, 2003

Appearance: Edward Davidson, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by Edward Davidson (Davidson) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Public Employees Union, Local #1 (Union) violated the Educational Employment Relations Act (EERA):[1] (1) by failing to adequately represent Davidson in a Berkeley Unified School District (District) personnel commission appeal challenging the termination of his employment; (2) by failing to timely file a grievance regarding alleged deprivation of vacation and overtime pay at the time of his termination; (3) by failing to file a grievance regarding his claim against the District for return of personal property; and (4) by failing to honor promises to reimburse him for private attorneys' fees and otherwise provide recompense for inadequate representation. Davidson

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

alleged that this conduct constituted a violation of the Union's duty of fair representation, codified at EERA section 3544.9,[2] thereby violating EERA section 3543.6(b).[3]

The Board agent dismissed Davidson's charge on grounds that the supporting allegations were untimely and/or failed to state a prima facie case.

Davidson's Appeal

On appeal, Davidson reasserts his contention that the Union provided inadequate representation during the District's personnel commission proceedings regarding his termination. Davidson also submits documents related to employee dissatisfaction with the Union and a successful decertification campaign.

PERB Regulation 32635(b)[4] provides: "Unless good cause is shown, a charging party may not present on appeal new allegations or new supporting evidence." Davidson has failed to demonstrate good cause to allow presentation of new allegations or evidence on appeal and nothing in the contents of the newly filed documents indicates that such good cause exists. Accordingly, the Board has not considered the new documents in resolving this case.

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[2] Section 3544.9 provides:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[3] Section 3543.6(b) states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[4] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Board also finds that none of Davidson's arguments address the deficiencies identified in the Board agent's warning and dismissal letters.

After reviewing the unfair practice charge and first amended charge, the warning and dismissal letters, and Davidson's appeal, the Board finds that the Board agent's warning and dismissal letters are free of prejudicial error and adopts them as the decision of the Board itself, subject to one exception: As the Board agent correctly determined that Davidson's allegations regarding the Union's alleged failure to file a grievance on the subject of his vacation and overtime pay were untimely, the Board declines to adopt the Board agent's discussion of the merits of those allegations.

ORDER

The unfair practice charge in Case Number SF-CO-587-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

Dismissal Letter

January 30, 2002

Edward Davidson
2806 Chanslor Avenue
Richmond, California 94804

Re: Edward Davidson v. Public Employees Union, Local #1
Unfair Practice Charge No. SF-CO-587-E
DISMISSAL LETTER

Dear Mr. Davidson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 3, 2001 and amended on January 18, 2002. Edward Davidson alleges that the Public Employees Union, Local #1 (Union) violated the Educational Employment Relations Act (EERA)[1] by failing to fulfill its duty of fair representation in regard to the termination of his employment with the Berkeley Unified School District and related matters.

I indicated to you in my attached letter dated December 28, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 10, 2002, the charge would be dismissed.

Following the grant of additional time, an amended charge was filed on January 18, 2002. The amended charge alleges that the overtime grievance was timely filed in May 1999, but the Union took no action on the matter for many months. The grievance was in its final step, when Jenny Lipow, the Union agent handling the matter "disappeared." As noted in the undersigned's December 28, 2001 letter, the Union took no further action on the overtime grievance -- or any other the other outstanding issues for that matter -- until September 2000, when Davidson succeeded in getting the Union's new manager, Chuck Egbert, and the new business agent, Lisa Davis, to investigate his issues. The allegation with respect to the overtime issue is untimely because Davidson should have known no later than September 2000 that the Union had failed to prosecute his grievance. The charge was not filed until May 3, 2001. The remaining allegations of the amended charge have been reviewed, but it is concluded that they fail to cure the deficiencies noted in the undersigned's December 28, 2001 letter. Even if the charge were timely filed, Davidson has failed to allege facts demonstrating that the Union breached its duty of fair representation by acting in an "arbitrary,

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

discriminatory, or bad faith" manner. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.)

Therefore, I am dismissing the charge based on the facts and reasons set forth above as well as those contained in my December 28, 2001 letter.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Donn Ginoza
Regional Attorney

Attachment

cc: Chuck Egbert

DNG

Warning Letter

December 28, 2001

Edward Davidson
2806 Chanslor Avenue
Richmond, California 94804

Re: Edward Davidson v. Public Employees Union, Local #1
Unfair Practice Charge No. SF-CO-587-E
WARNING LETTER

Dear Mr. Davidson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 3, 2001. Edward Davidson alleges that the Public Employees Union, Local #1 (Union) violated the Educational Employment Relations Act (EERA)[1] by failing to fulfill its duty of fair representation in regard to the termination of his employment with the Berkeley Unified School District and related matters.

Investigation of the charge revealed the following. Edward Davidson was employed by the District as a Custodial Supervisor. He was a permanent employee assigned to Willard Jr. High School. He had been employed by the District for approximately 30 years. In or around May 1999, the District accused Davidson of possession of an illegal substance, dishonesty, and insubordination. The principal of Willard recommended that Davidson be dismissed.

The District has a personnel commission for review of disciplinary matters. At the first level, the employee may appeal disciplinary action in a Skelly hearing before a staff member of the District designated as a hearing officer. Following that, the matter may be appealed to a hearing officer designated by the Commission. The final step of the appeal procedure involves a review by the Commission itself.

Davidson requested representation from the Union in regard to the charges against him. In or around May 1999, Business Agent Jenny Lipow became involved in the case. Davidson alleges that Lipow was derelict in her representation of him. She failed to meet filing deadlines, failed to return telephone calls, failed to use paperwork Davidson had offered, and "disappeared" for months at a time. Davidson alleges that Lipow allowed deadlines to expire and failed to initiate an investigation into certain matters despite "serious inconsistencies" in

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

the evidence against him. Lipow did represent Davidson at the Skelly hearing before Associate Superintendent Frank Brunetti. After evidence was received, Brunetti upheld the principal's recommendation. But Davidson alleges that near the start of the hearing, Brunetti told Lipow that he heard Lipow's baby crying in the next room, whereupon Lipow left the meeting, leaving Davidson with only a shop steward.

After Davidson complained to the Union, Manager of Operations John Stallsmith assured Davidson that he would make up for Lipow's failures. But Stallsmith failed to return telephone calls and again "left him hanging in limbo." Davidson retained a private attorney in December 1999 because he had lost confidence in Lipow. Stallsmith wrote to Davidson's attorney that the Union would secure a hearing through the Personnel Commission, but would also step aside if Davidson wished to have his attorney represent him in the matter. Davidson's attorney responded that Davidson wished to continue with Union representation. Stallsmith proceeded to file an appeal with the Personnel Commission.

Davidson alleges that Lipow admitted having "dropped the ball" in his case and missed a filing deadline for a grievance. It is unclear from the charge what the basis for this grievance may have been, or whether it simply related to the filing of an appeal of the dismissal.

In or around March 2000, Stallsmith requested that the District appoint an independent arbitrator to hear Davidson's appeal, rather than a hearing officer of the Personnel Commission. The District refused stating that Article 15 of the parties' agreement ("Disciplinary Action and Appeal") incorporates the Personnel Commission Rules as the basis for appeals of disciplinary action. (Article 15, section 15.3 of the agreement exempts disciplinary appeals from the grievance procedure.)

In any event, the matter was heard by Hearing Officer Jan Nieberlien on April 10, 2000. Davidson objected to the Union allowing a biased hearing officer to be assigned his case.

Nieberlien upheld the dismissal based on testimony that Davidson stored items which did not belong to him in the custodians' office in a locked cabinet which was accessible only to him. While the hearing officer found that some of the items in the cabinet did belong to Davidson, others such as a flute and a student's jacket should have been turned over to the District so that they could be returned to their owners. The hearing officer found that Davidson had willfully violated the school's "lost and found" policy as a result.

Evidence against Davidson was also received regarding an alleged transfer of an illegal substance from Davidson to a student. Jake Stookey, an Art and Drama teacher at Willard, observed Davidson carefully place an object wrapped in white paper on a bench in the courtyard and then observed a student walking toward the bench. Stookey walked between Davidson and the approaching student, picked up the object wrapped in white paper and took it to the office. Stookey also saw Davidson and the student exchange some kind of nonverbal communication. Stookey later examined the object and concluded it to be a marijuana joint. A police officer testified, confirming that the object contained marijuana.

Business Agent Jenny Lipow represented Davidson at the hearing. She argued that the penalty was excessive in light of Davidson's lengthy record of employment. Davidson testified and denied that he placed any object on the bench. He also denied seeing Stookey pick up any object from the bench.

No criminal charges were ever filed by the police against Davidson. Davidson notes that he won a hearing against the District before the Unemployment Insurance Appeals Board. Davidson contends that this evidence exonerates him.

Following the hearing officer's decision, Lipow and Union President Pat Robertson appeared before the Personnel Commission on June 21, 2000 urging that the Commission reject the decision. Robertson made her own presentation to the Commission.

On July 12, 2000, the District Personnel Services Department recommended that the Commission adopt the hearing officer's decision. The minutes of the July 19 Commission meeting state that the Union had requested that the Commission review the transcript of the hearing, but then failed to provide the Commission with the transcript. They further indicate that Brunetti asserted that the Commission was not obligated to read the transcripts. At this meeting, the Commission voted to approve the hearing officer's decision.

Sometime in the middle of 2000, Business Agent Lisa Davis succeeded Lipow and Chuck Egbert succeeded Stallsmith. Davis made promises to meet with the District's personnel director to resolve the matter, but she failed to do so.

Egbert promised to address issues related to overtime and vacation pay, which the District had allegedly failed to pay Davidson following his termination. Egbert claims that the vacation and overtime underpayment issue was not brought to the Union's attention until September 2000, more than a year after Davidson received his last paycheck, thus rendering the prospect of filing a grievance untenable. Davidson, however, asserts that he had provided the necessary documentation to Lipow earlier. Lipow submitted the documentation to the District in October 2000. Although Davidson received 223 days of vacation pay, he claims the District shorted him 27 days. Davidson's August 31, 1999 pay warrant indicates he had accumulated 250 days of vacation. Davidson also requested 45 hours of overtime pay. It is not clear on what he based this claim.

Egbert also offered the Union's assistance with regard to obtaining personal property belonging to Davidson that he was unable to retrieve following his termination. In regard to the matter of the termination however, Egbert informed Davidson by letter dated September 7, 2000 that based on an opinion by the Union's attorney, the Union would not pursue a superior court action in an attempt to overturn the Commission's decision.

Robertson then wrote a letter to Egbert on Davidson's behalf urging that the Union continue to pursue the matter. In response, Egbert held a meeting attended by Davidson and Lipow. Lipow made admissions that she had not done all she could have in the matter. Egbert ended

the meeting by promising to "follow up." Egbert made apologies to Davidson for Lipow's shortcomings and also promised to reimburse Davidson for his attorney's fees.

By letter dated January 17, 2001, Egbert stated that Davis or Robertson could accompany Davidson to the District to retrieve his property. He also stated that in the event this failed, Davidson could file a claim with the Board of Education for the monetary value of the unreturned property.

Davidson alleges that he requested the items when he was first put on administrative leave in May 1999. The District instructed him he could not come onto District property. He complied with this directive. Lipow failed to follow up on the matter. Davidson asked Davis to assist him. The District advised Davidson he could come and retrieve his property, but it did not include the items he was seeking. A list of the items shown to Davidson by the District was simply a list of the items in the "lost and found" locker. There were other more valuable things missing. Davis assured Davidson she would file a grievance but she never did. Davis told him she would do nothing further because he had filed the instant charge against the Union.

By letter dated February 16, 2001, Davidson wrote to Egbert to complain that Egbert had done nothing to rectify the errors of Lipow and Stallsmith regarding his termination. He insisted:

> if there had been any type of investigation into the allegations by anyone, most especially my union representative, this situation would never have progressed to the point that it did.

Davidson indicated he had "numerous letters and packets proving" his innocence of the charges against him.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

Davidson has alleged that the exclusive representative denied him the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, a charging party must show that the respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board (PERB) stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not

> arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

PERB has also held that as to rights or remedies that do not derive from the collective bargaining agreement, the exclusive representative does not owe a duty of fair representation. This has been found in the context of appeals of disciplinary actions in proceedings pursued outside the grievance procedure. (Los Angeles City and County School Employees Union (Morgan) (1987) PERB Decision No. 645 [claim that employee was poorly represented at a personnel commission dismissal hearing]; California State Employees Association (Parisi) (1989) PERB Decision No. 733-S [State Personnel Board appeal].)

In this case, the claims that Davidson was poorly represented in the matter related to his dismissal do not state a prima facie violation because the Union's performance before the Personnel Commission is not governed by the duty of fair representation. (Los Angeles City and County School Employees Union (Morgan), supra, PERB Decision No. 645.)

The matter of the Union's failure to file a grievance regarding the overtime and vacation underpayment fails to state a prima facie violation because it is not timely filed. EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Here, it does appear that Davidson's claim for overtime and vacation pay first arose in the fall of 1999 when he received his final paycheck. No action was taken by Lipow or the Union on the matter for nearly one year, until September 2000, when Davidson again raised the issue, this time with the new manager of the Union, Chuck Egbert. Lipow submitted Davidson's documentation for the first time in October 2000, at a time when the grievance timelines had clearly lapsed. Davidson knew or should have known in the fall of 1999, but certainly no later

than October 2000, that the Union did not intend to file a grievance over the matter. The charge was not filed until May 3, 2001.

Moreover, even assuming a grievance could have been filed, Davidson has not clearly demonstrated that the Union refused to file one for arbitrary, discriminatory, or bad faith reasons. It appears that the Union concluded a grievance would have been untimely. Such a decision would have had a rational basis. It also appears that the Union probably failed to file the grievance when Davidson first approached Lipow on the matter in the fall of 1999. In the latter case, the charge fails to demonstrate that the Union's failure to file the grievance in a timely fashion resulted from anything more than negligence. PERB has held that negligence resulting in the failure to file a grievance is insufficient to demonstrate a breach of the duty of fair representation. (United Teachers of Los Angeles (Collins), supra, PERB Decision No. 258; American Federation of State, County and Municipal Employees (Olson) (1988) PERB Decision No. 682-H.)

As to the claim for return of personal property, the charge also fails to demonstrate that the Union's unwillingness to file a grievance over the matter was the product of arbitrary, discriminatory or bad faith conduct. Matters of this kind are rarely covered in collective bargaining agreements, and Davidson has failed to identify any provision of the agreement to that effect.[2] Egbert informed Davidson that if he were unsuccessful in obtaining his property, his recourse would be to file a claim for money damages with the District Board of Education. Thus, it is unclear that the Union's failure to pursue the matter resulted in the forfeiture of a meritorious grievance. (United Teachers of Los Angeles (Collins), supra, PERB Decision No. 258.)

Finally, the Union's failure to live up to promises to reimburse Davidson for his attorney's fees and to rectify its previous shortcomings do not demonstrate a breach of the duty of fair representation. Such matters do not implicate the duty of fair representation. (See Lane v. I.U.O.E. Stationary Engineers (1989) 212 Cal.App.3d 164.)

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before **January 10, 2002**, I shall dismiss your charge.

[2] The undersigned has reviewed the collective bargaining agreement and was unable to identify any provision covering such a dispute.

If you have any questions, please call me at the above telephone number.

Sincerely,

Donn Ginoza
Regional Attorney

DNG